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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	MM Docket No. 92-266
and Competition Act of 1992:	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS OF PREVUE NETWORKS, INC.

These comments in response to the Commission's Further Notice of Proposed Rulemaking regarding leased commercial access ("LCA") are provided on behalf of Prevue Networks, Inc. ("Prevue Networks"). Prevue Networks produces and distributes electronic program guide and barker channel services to cable operators and other multi-channel programming distributors. It is the opinion of Prevue Networks that the Commission's proposed rules would, if implemented, have a severe, detrimental impact on our current programming services, and substantially inhibit our ability to develop and market new programming for the cable industry

Introduction.

Prevue Networks fully supports the stated goals of the Commission to establish a maximum reasonable rate for LCA which will "promote competition and diversity of programming sources on one hand, as well as further the growth and development of cable systems on the other."[1] However, the cost/market fee formula proposed by the Commission does not accomplish either of these goals and will, in fact, have the opposite effect. Reduction of the fees applicable to LCA and the resulting decrease in available distribution capacity which would be occupied by subsidized LCA programming will serve to inhibit and reduce, rather than promote, competition and diversity in programming. The Commission's proposed rules fail to recognize the high costs of developing quality programming and the competitive environment existing in the programming marketplace for its distribution.

We strongly urge the Commission to reject the proposed "cost/market" fee. This method of calculation will result in the unnecessary and unfair displacement of quality programming such as that produced by Prevue Networks. The Commission's proposed rules also fail to establish a reasonable fee which will adequately compensate cable operators for the substantial costs imposed by LCA. The provisions of the 1984 Cable Act[2] and the 1992 Cable Act[3] neither express nor imply that the role of the Commission is to foster or promote increased use of LCA channels. Rather, the role of the Commission is simply to insure that the maximum rates for LCA are reasonable, while allowing for

[1] *Order on Reconsideration of the First Report and Order and Notice of Further Proposed Rulemaking*, MM Docket NO 266, CS Docket No. 96-60 (1996) ("NPRM") at para. 25

[2] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat 2779 (1984), 47 U.S.C. § 521 *et seq* (the "1984 Cable Act")

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C. § 521 *et seq.* (1992) (the "1984 Cable Act").

the growth and development of cable systems.[4] The proposed "cost/market" fee fails to fulfill either of these requirements.

I. The Proposed Maximum Rate Formula Will Not Serve To Promote Diversity And Competition Of Programming Sources.

It is clear that the development and availability of new and diverse programming has not been impeded by the current rate formula for LCA. Approximately ninety (90) programming services have been launched since the 1992 Cable Act was enacted by Congress, representing diverse and compelling programming formats such as education, health, news/information, sports, movies, art, gardening, music, cooking, and comedy.[5] These programming services present original, quality programming which is predicated on consumer demand and interest. Programmers have invested literally millions of dollars in an effort to produce such programming content and services.[6] Prevue Networks has made, and continues to make, substantial investment in the development of quality programming. The Commission's proposed rules pose serious risk to this investment by potentially closing off available cable distribution of our programming in favor of LCA.

The rapid increase in the number of programming services and the resulting competition for carriage has created a severe lack of channel capacity in the cable industry.[7] As operators have added programming in an effort to meet consumer demand,

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[4] Communications Act of 1934, as amended, § 612(a), 47 U.S.C. § 532(a) (the "Communications Act").

[5] These services include The History Channel, Home & Garden Television, The Golf Channel, America's Talking, Sci-Fi Channel, The Travel Channel, The Food Network, and America's Health Network.

[6] Richard Katz, *Discovery Nets to Spend $160 Million on New Shows*, Multichannel News, May 8, 1995 at 54. Launch of new networks generally are estimated to cost in the neighborhood of $100 to $125 million. See, Richard Mahler, *Struggling to Hook Up With Viewers*, Los Angelos Times (April 29, 1996).

programmers aggressively compete for valuable capacity by targeting niche markets. As a result, the existing capacity has been exhausted. As the Commission must recognize, the implementation of delivery technologies which will effectively alleviate this capacity shortage will require years to construct. In the interim, the Commission should not take any action which would threaten the availability and viability of the very programming Congress intended to foster. It could not have been Congress' intent to displace quality programming representing a multitude of diverse interest to be displaced in favor or infomercials and home shopping channels.[8]

A reduction in channel capacity as a result of LCA will present Prevue Networks with a substantial decrease in future opportunities for increased distribution of our programming services, as well as a high potential to lose a portion of our current distribution. It is highly unlikely that programming services with loyal viewers, such as HBO, CNN, or USA, would be dropped. The programming targeted for replacement would programming with smaller viewing audiences such as the Prevue Channel or newly launch services yet to establish strong viewership.

While the Commission states "we do not believe that Congress intended that cable operators subsidize programmers who seek access to their systems through the provisions of Section 612,"[9] the proposed cost/market formula clearly will result in dramatically

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[7] Demands on channel capacity due to must-carry and retransmission requirements have already reduced the available to diverse networks. 47 C.F.R. §§ 56, 76

[8] Programmers which will be able to utilize LCA will be those which derive revenue from sourses other than advertising and subscriber fees, such as infomercials and shopping services. The Commission should note that the majority of commenters supporting LCA provide such programming. *See, e.g.* Petition for Reconsideration filed by ValueVision

[9] NPRM at para. 27

lower rates. Such rates would in effect subsidize LCA programmers by providing access to a large base of subscribers for programming which has little or no value to those subscribers. Subsidizing a "commercial" service in this manner is inappropriate, providing an unfair and unwarranted advantage to programming which contains little originality, diversity, or value to consumers. The result will be that diverse, quality programming such as Prevue Networks services, will be "bumped".[10]

II. The Proposed Maximum Rate Formula Is Not Reasonable And Will Adversely Effect The Growth And Development Of Cable Systems.

The Commission has concluded that the lack of utilization of LCA results from unreasonable high carriage fees imposed by the current "highest implicit fee" rate calculation. The basis for this conclusion articulated by the Commission is that (i) the operator receives double recovery of subscriber revenues, (ii) the operator is allowed to set a higher rate for LCA than it accepts for non-leased access programmers, and (iii) the highest implicit fee is not based on the reasonable costs imposed on operators. Under examination, each of these bases fails to support the Commissions conclusions. If anything, the unreasonableness of the current rate formula is that it undercompensates cable operators for the costs imposed by LCA. In addition, as noted above, the introduction of a multitude of new programming services over the last three years has provided consumers with substantial amounts of diverse and quality programming choices. It is the natural and logical result of the availability of these new services that demand and viability of LCA programming would decrease.

[10] NPRM at para. 65

a. Operators do not currently receive double recovery of revenues

The Commission's conclusion that operators receive double recovery from its subscribers is based upon the false assumptions that subscriber revenues will remain stable. This presumption is not supported by fact or experience.

The cable industry and its success is predicated on successfully meeting the demands of its customers by providing programming which delivers substantial value. Cable operators are today faced with an onslaught of competition in multi-channel programming delivery from DBS[11], direct-to-home satellite, and wireless service providers. Following passage of the Telecommunications Act[12], competition will be intensified as telcos and other entities enter the marketplace. Such competition places extreme emphasis and importance on the quality and value of the operator's programming offerings.

The current shortage of channel capacity exacerbates the operator's dilemma by requiring in most systems that existing programming services be dropped to accommodate requests for LCA. As operators replace existing, consumer accepted and valued programming with less desirable LCA programming, such as infomercial and shopping services, subscriber revenues will decrease substantially. Therefore, operators are not reaping double revenues, but simply off-setting lost revenues from subscribers who elect to receive their programming from a source delivering higher value.

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[11] The ability of cable operators to compete is already impeded to some extent by the inapplicability of must carry requirements to these entities

[12] Telecommuncations Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

As the Commission noted,[13] there has been very little use of LCA capacity by programmers. The fact that double recovery by the operator is not occurring is supported by this lack of LCA utilization. If cable operators are actually being presented with an opportunity for double recovery of revenues under the highest implicit fee formula, the anticipated result would be a more widespread utilization of LCA programming. Operators would aggressively promote and seek our LCA programming if such double recovery was possible

b. The rates for LCA are not in excess of those for non-leased access

The current maximum rate formula for LCA programming is not in excess of those accepted by cable operators for non-leased access programming. The distinction which must be drawn between leased and non-leased access programming is that of their respective revenue generating characteristics.

Cable operators provide carriage and pay programming fees to non-leased access programmers predicated on such programming's value to the operator's current and potential customers. The operator is not "accepting" a fee from the programmer, but rather utilizing the programming to generate revenue through sales. In contrast, LCA programming carries no positive value to the vast majority of the operator's subscribers, and will in most instances represent lost value to those subscribers. Allowing operator's to charge the highest implicit fee to LCA programmers merely recognizes the fact that the least valuable non-leased programming service (which presumably would also have the lowest programming fee) represents greater value, or "price" than any LCA programming.

[13] NPRM at para 6

c. Costs imposed on operators by LCA exceed the current maximum fee.

Section 612 of the Communications Act expressly requires that the Commission establish LCA rules which "...are at least sufficient to assure that such use will not adversely effect the operation, financial condition, or market development of the cable system."[14] The potential subscriber and revenue loss resulting from LCA programming represents a true cost imposed on operators which is not fully compensated by the current maximum fee, and certainly not by the Commission's proposed cost/market formula. This potential subscriber and revenue loss will also severely impact the system's growth and development by inhibiting its ability to compete with other multi-channel programming providers.

As stated by at least one cable operator in this proceeding, the current maximum fee formula fails to adequately compensate for true lost opportunity costs imposed by LCA.[15] Failure to compensate actual costs can hardly be deemed a windfall to the operator. As more competition for subscribers develops as a result of the Telecommunications Act, the failure to fully compensate operators for LCA will increase the adverse effects on the operator's growth The inability to carry programming provided by its competitors due to capacity constraints will mandate that the Commission develop LCA pricing which allows for the recovery of the full cost of allocating channels to LCA programmers.

[14] Communications Act, § 612(a), 47 U.S.C. § 532(a)

[15] Time Warner Entertainment Company, L.P., Petition at 34.

Conclusion.

In this proceeding, the Commission has reached the incorrect conclusion that the lack of demand for and utilization of LCA is due to unfairly high carriage rates. This lack of demand, however, results from a variety of other acceptable conditions in the marketplace, including the development and availability of diverse programming by traditional programmers, prohibitably high production costs, and low consumer desire for the types of programming offered by LCA programmers.

Prevue Networks therefore urges the Commission to refrain from any modifications of the maximum fee formula which would result in lowering the maximum amount which cable operators may charge for LCA. Such lowering of the maximum fee will fail to adequately compensate operators for the costs, including opportunity costs, incurred in making such LCA available. Lower maximum fees will also severely inhibit the operator's ability to grow and compete in the developing market for multi-channel programming distribution resulting from the implementation of the Telecommunications Act.

In addition, the traditional programming industry has responded to consumer demand for diversity of programming content by developing and delivering an amazing array of new programming services dedicated to fulfilling such demand. The Commission should not reward the initiative and innovation of these programmers by promulgating rules which will unfairly constrict the availability of capacity for these new services.

The Commission should, at a minimum, retain the current maximum rate formula and allow both consumer demand and technological advancement continue to fulfill congressional intent with regard to programming diversity.

Respectfully Submitted,
PREVUE NETWORKS, INC.

L. Joe Hedges 5/15/96
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